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In the Supreme Court of the United States

No. 76-1319

BURLEIGH HOUSE CONDOMINIUM, INC., a non profit Florida corporation, on behalf of itself and its membership,
Petitioner,

vs.

HERBERT BUCHWALD, individually and as trustee, and BURLEIGH HOUSE, INC., a Florida corporation for profit, individually, jointly and severally,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the petitioner condominium association lacks standing to sue in its own right as a real party in interest under 15 U.S.C. § 15 for an alleged tying arrangement violation of 15 U.S.C. § 1, since it affirmatively appears that the association was not a purchaser of the tying product (condominium units) nor a consumer of the tied product (recreation facilities), and therefore, not a victim of the alleged tying arrangement and not in anywise injured in its business or property.

STATEMENT

The plaintiff-appellant below petitions this Court to review the decision in *Burleigh House Condominium, Inc.* v. *Buchwald,* 546 F.2d 57 (5 Cir. 1977) vacating the judgment of the trial court (for defendants-appellees) and remanding for entry of an order of dismissal.

The decision in the instant case is based on the controlling decision in *Buckley Towers Condominium, Inc.* v. *Buchwald,* 533 F.2d 934 (5 Cir. 1976), *cert. denied,* ..... U.S. ....., 97 S. Ct. 1157, 51 L. Ed. 2d 571, holding that the condominium association lacks standing to sue as a real party in interest under 15 U.S.C. § 15 for an alleged tie-in violation of 15 U.S.C. § 1.

The Florida Legislature enacted the Condominium Act (Chapter 711, Florida Statutes 1963, as amended) giving statutory recognition to the condominium form of ownership of real property, establishing procedures governing the creation, sale and operation of condominiums, and prescribing the property rights and interests of all parties. The Act expressly authorizes the leasing of recreation facilities for the use, benefit and enjoyment of the unit owners as an integral part of the condominium project. The unit owners pay proportionately for the use of the recreation facilities as part of the common expenses incident to the condominium. The concept of selling condominium units subject to an existing lease of recreation facilities devoted to the exclusive use of the unit owners is sanctioned by the legislature and the state courts.

A condominium association is created as the corporate entity charged with the responsibility for the operation and maintenance of the condominium property designated as common elements, which common elements are owned in

common by all the unit owners in undivided shares. The common elements are the portions of the condominium property not included in the units. The title and common ownership of the common elements are inseparable from the title and individual ownership of the units. Each unit owner is responsible for his pro rata share of the common expenses for the maintenance and operation of the common elements owned in common by all unit owners. The rent for the use of the leased recreation facilities is paid proportionately by the unit owners as part of the common expenses. The condominium association serves as manager of the common elements and recreation facilities for the unit owners with respect to the operation and maintenance thereof. The condominium is not the owner of a unit and has no property rights or ownership interest in any condominium property. It is not a purchaser of the units, and it is not a use consumer of the leased recreation facilities, which are restricted to the exclusive use of the unit owners. The membership of the association consists of the record owners of the condominium units, from time to time. When a unit owner sells his unit, he ceases to be a member of the association and is completely released from all liability for payment of the common expenses. The buyer of a unit becomes a member of the association. The Burleigh House Condominium was created December 23, 1969, in accordance with the provisions of the Florida Condominium Act. Since then, the original owner and developer has sold all 360 condominium units, and approximately 200 of the initial purchasers from the developer have resold their units to others. Accordingly, the membership of the association constantly changes from time to time as the units are sold and resold. Only the current record unit owners on a given day constitute the membership of the association. The former unit owners who resold their units are not members of the association.

The original owner and developer of the Burleigh House Condominium made full disclosure of the nature, terms and extent of the lease providing recreation facilities for the exclusive use, enjoyment and benefit of the unit owners. Each purchaser was furnished copies of the recorded condominium documents, including the recreation lease. The developer sold all the condominium units to individual buyers by warranty deed executed by each buyer, as grantee, wherein the buyer covenanted and agreed that by execution of the deed he specifically approved, ratified, confirmed and agreed to be bound by the terms of the recreation lease. The initial purchasers from the developer have resold units under the same terms and conditions. The condominium association did not purchase a condominium unit and has never become a unit owner.

The memorandum opinion of the district court, on the basis of the evidence at trial, adjudicated:

> In 1963 the Florida Legislature authorized a condominium form of ownership of real property. Florida Statutes, Chapter 711 . . . The Condominium Act authorizes "any portion of the common elements or common areas or any other property serving the unit owners of a condominium" to be leased. Section 711.63, Fla. Stat.
>
> By means of a booklet containing the condominium documents, which was given to each purchaser at Burleigh House, the developer made full disclosure of the fact and extent of the lease upon the recreation facilities. Each purchaser acquired fee title to his own apartment unit. Each purchaser had an equal ownership share and responsibility for the common elements. Florida Statutes, § 711.12. The association's membership consists of all unit owners.

The condominium association, Burleigh House Condominium, Inc., sued on its own behalf and on behalf of its membership invoking federal jurisdiction under 15 U.S.C. § 15, alleging violation of the Sherman Act, 15 U.S.C. § 1. The association claimed that the sale of condominium units, subject to the terms of the existing lease of recreation facilities, constituted an illegal tying arrangement. The units were designated as the tying product, and the recreation facilities as the tied product. It was contended that the recreation facilities were tied to the condominium units, in that the units could be purchased only if the buyer accepted and agreed to be bound by the lease of the recreation facilities provided for the exclusive use of the unit owners. The post trial memorandum opinion of the District Court Judge characterized the claim as follows: "The claim was based upon a novel theory of liability[1] . . ."

The defendants moved to dismiss the action on various grounds, including (1) lack of subject matter jurisdiction,

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1. Under the novel theory advocated herein, it would be impossible for recreation facilities to be included in any condominium project, without incurring antitrust liability. Although recreation facilities are necessary or desirable, particularly in connection with a high rise apartment condominium, the inclusion of recreation facilities would constitute an actionable tying arrangement. This is so, regardless of whether the recreation facilities are sold with the units as part of the common elements (which necessarily increases the cash purchase price), or whether the recreation facilities are made available for use by unit owners under lease (on a pay-as-you use basis). The tying theory in this case, however, makes the mere existence of recreation facilities an antitrust violation. It is claimed that a purchaser must have the right to buy a condominium unit without recreation facilities; and, therefore, the sale of units with recreation facilities constitutes a tying arrangement. Hypothetically, if a person wishes to use the recreation facilities within the condominium, without having to purchase a condominium unit, the coupling of the ownership of condominium units with recreation facilities in any manner would, according to plaintiff's theory, constitute a tying violation of the antitrust laws. It is indeed a novel theory that makes inclusion of recreation facilities in a condominium an antitrust violation, unless, of course, they are provided free of charge to the purchasers of units.

and (2) the lack of standing of the condominium association to sue as the real party in interest. Upon consideration of the motion to dismiss and memoranda of the parties, the court ordered that:

> The motion is denied. Because the jurisdictional issue is closely intertwined with or dependent upon the merits of the claim, a final determination of the subject matter jurisdiction is appropriate after full presentation of the evidence. This preliminary ruling addresses only the motion to dismiss and is subject to review after all the evidence on the effects on interstate commerce is presented at trial.

The defendant moved to compel the joinder of the condominium unit owners as the real parties in interest, and to dismiss the condominium association for lack of standing as a real party in interest. The plaintiff condominium association opposed the defendant's motion. The court denied the motion.

Claims of Unit Owners Presented at Trial

This action came on for jury trial upon the issues presented by the complaint, answer and affirmative defenses, and the joint pretrial stipulation.

At the trial, testimony and evidentiary exhibits were presented in support of the claim on behalf of the members of the condominium association, the condominium unit owners. The plaintiff's expert witness testified at length concerning the impact of the alleged tying arrangement upon the unit owners.

At the close of the case presented on behalf of the condominium association and its membership, the court granted defendants' motion for directed verdict and dismissed the action for lack of jurisdiction, because the evidence failed to show the alleged antitrust activities of the defendants had any effect upon interstate commerce in the tied market. Judgment for defendants was rendered. Plaintiff's Rule 60(b) motion for relief from the judgment was denied. The court rendered memorandum opinion and order dismissing cause, stating that since "the claim was based upon a novel theory of liability" and "Because the questions raised in this case are of first impression, the Court takes the opportunity to expand the announcement of decision made in directing a verdict for defendants at the close of plaintiff's case."

On appeal, the question of the standing of the condominium association to sue as a real party in interest under 15 U.S.C. § 1 was not raised. The parties recognized that evidence in support of the claim of the unit owners constituting the membership of the condominium association had been presented at the trial for consideration by the jury and the court.

Pursuant to briefs and oral argument, the court of appeals vacated the judgment and remanded for entry of an order of dismissal, stating:

> This cause went to trial and, at the close of the evidence offered by appellant, the district court granted appellee's motion for directed verdict. The condominium association appealed on several grounds but we will not reach those issues. This Court's primary concern is whether or not the condominium association has standing to sue as a real party in interest under 15 U.S.C. § 25. This question was raised by the appellees in their motion to dismiss filed March 4, 1975 which the district court denied.

546 F.2d 57, at 58.

ARGUMENT

Objections to standing, unlike Rule 17(a) objections, cannot be waived and may be raised by a federal court *sua sponte*. *United States* v. *Storer Broadcasting Company*, 351 U. S. 192, 100 L. Ed. 1031, 76 S. Ct. 763.

The condominium association prosecuted this private antitrust action on its own behalf and on behalf of its membership. The association sued for recovery in its own right. It also sued for recovery on behalf of the condominium unit owners. The association occupied a dual role in prosecuting its own claims, and the claims of the unit owners. The claims of the association against defendants differed from the claims of the unit owners, since the contractual relations were different. The standing question in this litigation involves the association's standing to sue on its own behalf, and its standing to sue for and on behalf of the unit owners. The capacity of a non profit corporation (such as the condominium association) to be a litigant in a federal action is not involved.

Under any test, the condominium association clearly lacks standing to sue in its own right as the real party in interest under 15 U.S.C. § 15.

The alleged antitrust behavior relied on herein consisted of selling condominium units subject to a lease providing recreation facilities for exclusive use by the unit owners. It was claimed that this constituted an illegal tying arrangement, in that the leased recreation facilities were tied to the condominium units; that purchasers were required to accept the terms of the recreation lease in order to buy a condominium unit. The cost for the use of the leased recreation facilities was borne by the unit owners.

Given the nature of the alleged tying arrangement, the condominium association was not in any sense a "victim" of the tying arrangement, because the association was not a purchaser of a condominium unit and never became a unit owner. The protection of the Act extends to all who are made "victims" of the forbidden practices. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Company*, 334 U.S. 219, 92 L. Ed. 1328, 68 S. Ct. 996. The required causal connection of antitrust violation to injury could exist only with respect to purchasers of the condominium units. *Buckley Towers Condominium, Inc.* v. *Buchwald*, 533 F.2d 934, 936 (5 Cir. 1976), *cert. denied*, ... U.S. ....., 97 S. Ct. 1157, 51 L. Ed. 2d 571.

An antitrust plaintiff lacks standing to recover treble damages in the absence of injury to business or property, which refers to commercial interests or enterprises. *Hawaii* v. *Standard Oil Company*, 405 U.S. 251, 31 L. Ed. 2d 184, 92 S. Ct. 885. The status of the condominium association as a non-buyer of the alleged tying product (condominium units), and as a non-user of the alleged tied product (recreation facilities), demonstrates the absence of any injury to its commercial interests or enterprises. As *Buckley Towers Condominium, Inc.* v. *Buchwald, supra*, states:

> Buckley (the condominium association) acts solely as a conduit in collecting the assessments from the unit owners and paying the rental to the appellees. The association thus is not injured in its commercial interests or enterprises as a result of the alleged unlawful tying arrangement. Indeed, in the strict sense it has no commercial interests or enterprises.

In order to have standing, the condominium association must prove an injury to its business or property which

bears a causal relation to a proven antitrust violation. At trial, the condominium association failed to prove either an injury or an antitrust violation.

The federal courts, as noted in *Hawaii* v. *Standard Oil Co., supra,* are in agreement that the antitrust laws are not intended to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. An antitrust plaintiff is required to show a causal connection between injury and the unlawful antitrust behavior of defendants. This requirement is incorporated into the standing doctrine governing private antitrust actions.

The "target area" test for standing has been utilized by a substantial number of circuits, including the Fifth Circuit, for determining whether an injury is sufficiently direct to be remediable by a treble damage action under 15 U.S.C. § 15. The "target area" test limits standing to those persons against whom the conspiracy is aimed. The focus is on claimant's relationship to the area of the economy injured by the defendants. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured "by reason" of anything forbidden in the antitrust laws. *In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122, 125-30 (9 Cir. 1973), *cert. denied,* 414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336.

The doctrine of standing poses the question whether a particular person is a proper party to litigate a given issue. Clearly provided for under 15 U.S.C. § 15 is the requirement that plaintiff must have suffered injury at the hands of the defendant. This prerequisite both defines the real party in interest and satisfies the minimum constitu-

tional criterion. *See Malamud* v. *Sinclair Oil Corporation,* 521 F.2d 1142 (6 Cir. 1975), wherein the court concluded that the standing test to be applied in an antitrust action is the one expressed by this Court in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184.

The *Data Processing* test indicates two requirements for standing: (1) the action challenged must have caused the plaintiff injury in fact; and (2) the interest sought to be protected must arguably be within the zone of interests to be protected by the statute in question. This Court has made it clear that the *Data Processing* test does not constitute "abandoning the requirement that the party seeking review must himself have suffered an injury." *Sierra Club* v. *Morton,* 405 U.S. 728, 738, 92 S. Ct. 1361, 31 L. Ed. 2d 636. A plaintiff seeking the aid of a federal court must allege facts from which it can be reasonably inferred that plaintiff's injury resulted in a "concretely demonstrable way" from defendant's action and that a grant by the court of the relief sought will remedy the wrong suffered by plaintiff. *Warth* v. *Seldin,* 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343. The standing doctrine incorporates a prudential limitation on the judicial power by demanding "that the interest of the plaintiff, regardless of its nature in the absolute, at least be arguably within the zone of interests to be protected or regulated by the statutory framework within which his claim arises." *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, at 39 n. 19, 96 S. Ct. 1917, 48 L. Ed. 2d 450.

The condominium association presented no evidence to show any injury to itself, or that the association had any interest within the zone of interests to be protected by 15 U.S.C. § 15. It was not the "victim" of the alleged

tying arrangement. A party may not ordinarily assert the rights of others, and the association gives no reason why its members who may be injured by the alleged tying arrangement cannot assert their claim on their own behalf. On the contrary, petitioner asserts that the court of appeals "should have permitted an opportunity for the substitution or joinder of those persons whom in the view of the court of appeals, should be the proper parties." (Br. 6). Petitioner cites and relies on the provisions of Fed. R. Civ. P. 17(a).[2]

The basic purpose of Rule 17(a) requiring that every action shall be prosecuted by the real party in interest is to protect the defendant from subsequent similar actions by one not a party to the initial action. *Pacific Coast Agriculture Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9 Cir. 1975), *cert. denied*, 425 U.S. 959, 96 S. Ct. 174; *Virginia Electric & Power Corp.* v. *Westinghouse Electric Corp.*, 485 F.2d 78, 84 (4 Cir. 1973), *cert. denied*, 415 U.S. 935, 94 S. Ct. 1450, 39 L. Ed. 2d 493.

The record clearly showed that the condominium unit owners are the real parties in interest under 15 U.S.C. § 15. The defendants timely raised the standing of the plaintiff condominium association, and sought the real party in interest protection afforded by Rule 17(a). The district court ruled that the plaintiff condominium association had

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2. Rule 17(a) provides:

"Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

standing to sue on its own behalf and on behalf of his membership; that the real parties in interest were before the court. Pursuant to such successive rulings on the standing issue and the real party in interest issue, the litigation proceeded to trial and final judgment on the merits. The antitrust claims on behalf of the condominium unit owners, as and constituting the membership of the condominium association, were tried and adjudicated. It was clearly apparent that the association did not have an antitrust claim in its own right. The defendants successfully defended against the alleged antitrust claim, at substantial cost and expenses not recoverable in the defense of an antitrust action. See the district court's memorandum opinion contained in the appendix to petitioner's brief.

Since the alleged tying arrangement claim of the condominium association and its membership (the unit owners) had been fully litigated to trial and final judgment, the standing question was not raised on appeal. The parties urged appellate consideration of the trial court proceedings on the merits. However, the court of appeals *sua sponte* vacated the trial court's judgment on the merits and remanded for entry of an order of dismissal. The court of appeals cited and relied on the decision in *Buckley Towers Condominium, Inc.* v. *Buchwald*, 533 F.2d 934 (5 Cir. 1976), *cert. denied*, ... U.S. ....., 97 S. Ct. 1157, 51 L. Ed. 2d 571, holding that a condominium association lacks standing to sue on a real party in interest under 15 U.S.C. § 15. At this stage of the proceedings, petitioner-appellant-plaintiff urges remand to permit retrial of the alleged antitrust claim in the name "of those persons whom . . . shall be the proper parties."

It is significant that this private antitrust action was not disposed of at a preliminary stage on the pleadings. It

proceeded to jury trial and final judgment on the merits. The condominium association and its members, the unit owners, were afforded the opportunity to prove the alleged tying arrangement violation. They failed to do so. They now demand the right to relitigate the same tie-in claim in the name of whatever "proper parties" the court may suggest. Meanwhile, petitioner insists that the condominium association had standing to sue as the real party in interest for the alleged tying arrangement violation, and that the decision in *Buckley Towers* should be overruled.

Although the trial of the alleged antitrust claim resulted in judgment for defendants, they are faced with the real threat of being compelled to defend a second action by the unit owners alleging the identical tying arrangement claim. Under the circumstances, the rights of the defendants are worthy of some consideration.

The question of mootness arises from the fact that the defendants were adjudicated not guilty of the alleged antitrust behavior upon full consideration of all the evidence presented on behalf of the condominium association and its members, the unit owners. The subject matter of this litigation is the alleged tying arrangement. Since there was no unlawful tying arrangement, it is immaterial as to whom the defendants might have been liable had the tying arrangement existed.

In general, to have standing to litigate, a party must show that he has incurred, or is in immediate danger of incurring, some direct and personal injury resulting from the violation of a constitutional or statutory right designed to protect that party. Even a slight injury may suffice in some circumstances. Yet the fundamental principle remains inviolate; one who has no personal stake in the

outcome of the controversy always lacks standing. *See Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696, 701 (5 Cir. 1973), *rehearing denied*, 478 F. 2d 1403, *cert. denied*, 415 U.S. 914, 94 S. Ct. 1410, 39 L. Ed. 2d 468, and authorities cited therein.

CONCLUSION

The petition for a writ of certiorari to review the decision in *Burleigh House Condominium, Inc.* v. *Buchwald*, 546 F.2d 57 (5 Cir. 1977) should be denied. Such decision is not in conflict with the decision of another court of appeals on the same subject matter. It does not decide an important question of federal law which has not been, but should be, settled by this Court. It does not decide a federal question in a way that conflicts with applicable decisions of this Court. The decision herein has not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondents in Opposition have been furnished to JOSEPH S. PAGLINO, Esquire, 88 N. E. 79th Street, Miami, Florida 33138, Attorney for Petitioner, by mail, in accordance with Rule 33, this 7th day of June, 1977.

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